

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

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COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0310-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JERALD RAYMOND WALKER,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022270

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Terry Goddard, Arizona Attorney General  
By Kimberly H. Ortiz

Tucson  
Attorneys for Respondent

Emily Danies

Tucson  
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Jerald Walker was convicted pursuant to a plea agreement of four counts of fraudulent scheme and artifice, five counts of theft, and four counts of fraud in the purchase or sale of securities. The trial court sentenced him to concurrent, mitigated prison terms, the

longest of which was four years. The court later entered an order pursuant to the parties' stipulation requiring Walker to pay \$367,792.63 in restitution. Walker now seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review a trial court's post-conviction ruling for an abuse of discretion, *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find no abuse here.

¶2 The convictions stemmed from Walker's systematic theft of funds from a trust fund of which he was the trustee. The beneficiary of the trust, and Walker's victim, had been severely injured in an automobile accident when he was seventeen. The trust corpus, approximately \$610,000, constituted the net proceeds from a settlement the victim received as a result of his accident. Walker was named trustee when the trust was created in December 1992, but by 1995, he had depleted the entire trust fund by various methods, including purchasing an unneeded insurance policy on the trust beneficiary for which Walker received commissions for a number of years, lending money to noncreditworthy people that was never repaid and for which no loan documents were prepared, persuading the victim to mortgage his fully owned house and then using the mortgage proceeds to purchase an interest in Walker's name in an insurance agency, and selling mutual funds that belonged to the trust to purchase real property in Walker's own name.

¶3 Walker argues the trial court abused its discretion in denying relief on his post-conviction claim that his prison terms should be vacated, he should be placed on probation,

and the amount of restitution he is required to pay should be reduced. He sought relief based on his claim that newly discovered evidence showed the victim had since sold for nearly \$300,000 land he claimed at sentencing to be worthless. The trial court found the evidence was newly discovered but concluded it would have made no difference in its determination that probation was not appropriate. The court also noted that the value of the land had been irrelevant in calculating the appropriate amount of restitution.

¶4 We disagree with the court's conclusion that the evidence was newly discovered. Under Rule 32.1(e), a defendant claiming newly discovered evidence must show (1) material facts were discovered after trial, (2) the defendant exercised due diligence in discovering those facts, and (3) the facts are not merely cumulative or impeaching, and they would probably have changed the verdict or sentence. For the first requirement, "the evidence must appear on its face to have existed at the time of trial but be discovered after trial." *State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989). In this case, however, the evidence clearly did not exist at the time Walker was sentenced. His own documents for one of the parcels show the land was not sold until April 26, 2005, ten months after the sentencing hearing. The date of sale for the second parcel appears only on a mostly unreadable document. In his notice of post-conviction relief filed a year after sentencing, however, Walker stated that both parcels had "recently sold."

¶5 In any event, the trial court did not abuse its discretion in denying post-conviction relief. At sentencing, the court noted that, although several facts of Walker's case

might have merited aggravated sentences, because *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), had been decided four days earlier, the court was prohibited from finding aggravating factors that Walker had not admitted at the change-of-plea hearing. Because the court found two mitigating factors existed, it imposed mitigated sentences. But the court's lengthy statement about why probation was not appropriate was unrelated to any factors involved in determining the appropriate amount of restitution.

¶6 The factual basis for Walker's guilty pleas included his admissions that he had used trust funds of \$145,753.59 to purchase in his own name 10.2 acres of undeveloped land in September 1994. Walker received a \$20,000 commission for purchasing the property. In October 1996, Walker transferred 3.3 acres to his codefendant who later sold it for \$78,000. At the sentencing hearing, the victim's father stated that Walker had quitclaimed the remaining acreage to the victim although it had previously been used to secure "hundreds of thousands of dollars" worth of loans. The father reported that the loans had been taken care of, but the property was "useless" because Walker had subdivided it without providing legal access to each parcel.

¶7 In the parties' stipulation on restitution, the only amounts related to the land are \$78,000, representing the codefendant's sales price for the 3.3 acres, and \$20,000, representing the commission Walker received for purchasing the 10.2 acres. There is no mention of the land Walker had quitclaimed to the victim. That the victim was able to sell the land for net cash of what appears to be \$157,000 more than ten years after Walker had

illegally purchased it did not warrant a reduction in the amount of restitution Walker agreed to pay. Moreover, in his request for post-conviction relief, Walker failed to acknowledge the number of years the victim had been deprived of funds that had been awarded to him for his permanent, disabling injuries as a result of Walker's criminal acts.

¶8 We grant the petition for review, but deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PETER J. ECKERSTROM, Judge